1 BEFORE THE PERSONNEL APPEALS BOARD 2 STATE OF WASHINGTON 3 4 Case No. SUSP-02-0053 5 MICHAEL JAVORSKY, FINDINGS OF FACT, CONCLUSIONS OF 6 LAW AND ORDER OF THE BOARD Appellant, 7 v. 8 UNIVERSITY OF WASHINGTON, 9 Respondent. 10 11 I. INTRODUCTION 12 1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER 13 T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and BUSSE NUTLEY, Member. The 14 hearing was held in the Pine Conference Room at the Department of Social and Health Services' 15 West Seattle Training Center in Seattle, Washington, on July 17, 2003. 16 17 1.2 **Appearances.** Appellant Michael Javorsky was present and was represented by Sydney 18 Vinnedge, Attorney at Law, of Emmal, Skalbania & Vinnedge. Jeffrey Davis, Assistant Attorney 19 General, represented Respondent University of Washington. 20 21 1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a one-day (ten hour) 22 suspension for insubordination and failure to follow departmental policy. Respondent alleged that 23 Appellant did not comply with directions from his supervisor, and did not follow departmental 24 policy regarding extra jurisdictional off duty action and prompt response to orders. 25 26 Personnel Appeals Board 2828 Capitol Boulevard Olympia, Washington 98504

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1	1.4 Citations Discussed. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084				
2	(1983); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); Skaalheim v.				
3	Dep't of Social & Health Services, PAB No. D93-053 (1994); Aquino v. University of Washington,				
4	PAB No. D93-163 (1995); <u>Holladay v. Dep't of Veterans Affairs</u> , PAB No. D91-084 (1992).				
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6	II. FINDINGS OF FACT				
7	2.1 Appellant is a permanent employee for Respondent University of Washington. Appellant				
8	and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated				
9	thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals				
10	Board on November 26, 2002.				
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12	2.2 Appellant is a Police Officer with the University of Washington Police Department				
13	(UWPD). Appellant began working for the University of Washington on October 29, 1996, and				
14	became a police officer on August 26, 1997.				
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16	2.3 Appellant had received no prior formal discipline; however, he had received the following				
17	written reprimands:				
18	 An August 18, 1998 letter for unprofessional behavior. 				
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20	• A December 3, 1998 Letter of Reprimand for violating the extra-jurisdictional policy and failing to provide truthful and complete communication to supervisors.				
21 22	• A January 27, 1999 Letter of Reprimand for inappropriate use of University of Washington equipment.				
23	A September 2, 1999 Letter of Reprimand for failure to comply with a Corrective Action				

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supervisors.

a suspect during an arrest.

Plan addressing Appellant's failure to accept constructive criticism and guidance from

A July 18, 2000 Letter of Counseling for inappropriate and unprofessional behavior toward

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1	An August 15, 2001 Letter of Reprimand for unsafe behavior and violating the ext jurisdictional policy.				
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3	2.4 As a Police Officer, Appellant was responsible for petrolling the University of Weshington				
4	2.4 As a Police Officer, Appellant was responsible for patrolling the University of Washington				
5	property. The University of Washington officers are authorized to take police action while off				
6	campus under certain limited circumstances. The limited circumstances are identified in the Extra				
7	Jurisdictional Policy. According to the policy, the situation must be tied to official UWPD business				
8	or be criminal activity that is an immediate threat to life, safety, or substantial property loss.				
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10	2.5 The University of Washington Police Department's Policy 3.02.01(2)(3) Extra Jurisdictional				
11	Off Duty Action Policy states in part:				
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13	In determining whether to take enforcement action outside of University of Washington jurisdiction, officers shall consider whether a delay would pose an immediate threat to life,				
14	safety or substantial property loss. If the delay would not pose such a threat, the officer shall refer the incident to the agency of jurisdiction without taking action.				
15	Officers exercising police action outside of their jurisdiction are required to immediately				
16	report their actions to the police agency in whose jurisdiction the action was taken and to the on duty University of Washington Police Department supervisor as soon as circumstances				
17	allow.				
18	2.6 The University of Washington Police Department's Policy 7.07.02 Prompt Response To				
19	Orders Policy states in part:				
20	Orders I oney states in part.				
21	Uniformed personnel are expected to obey lawful orders from ranking personnel as				
22	promptly and completely as possible. Failure to obey promptly will be considered neglect				
23	of duty.				
24	The Doord has been presented with two different versions of the actions taken by American				
25	2.7 The Board has been presented with two different versions of the actions taken by Appellant				
	on March 21, 22, and 23, 2002. In making a determination of the facts, we must resolve whether				
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the version presented by Appellant or the version given by his supervisors, Sergeant Craig Wilson 1 and Lieutenant Rich Lewis, is more credible. In reviewing the evidence before us, we find 2 discrepancies between Appellant's testimony and documents he previously provided related to this 3 case. As a result, we do not find Appellant credible or his version of the events believable. On the 4 other hand, Sergeant Wilson and Lieutenant Lewis were consistent in their statements throughout 5 the preceding investigation. Furthermore, we find their demeanor and testimony before us to be 6 forthright, candid, and credible, and we find no reason to disbelieve them. 7 preponderance of the credible evidence and testimony presented, we find that the following 8 occurred: 9 10 2.8 On March 21, 2002, at 11:28 p.m., Appellant stopped a driver approximately one-half mile 11 from the campus for a traffic infraction and saw marijuana in the driver's car. Appellant persuaded 12 the driver to provide the name and address of the person who had sold him the marijuana. The 13 driver showed Appellant where the marijuana dealer lived, which was approximately three quarters 14 of a mile off campus and outside the primary jurisdiction of the UWPD. 15

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2.9 Appellant returned to the police station and reported to his supervisor, Sergeant Craig Wilson, that he had received information about a marijuana dealer after stopping a driver with marijuana in his car. Appellant indicated that he wanted to get a search warrant for the marijuana dealer's house. Sergeant Wilson questioned Appellant as to whether or not the information from the driver could be considered reliable. Sergeant Wilson also asked Appellant if there was any

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replied "no."

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Based on a

information that tied the marijuana dealer to the University of Washington students, and Appellant

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2.12 While walking through the house, Appellant saw the marijuana dealer's name written on a dry erase board and smelled a strong marijuana odor outside one of the closed bedroom doors.

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2.13 Appellant returned home to type an affidavit and search warrant, and he later reported to work. During his work shift, Appellant failed to notify Sergeant Wilson that he had been inside the drug dealer's house earlier that day.

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2.14 The following day, March 23, 2002, Appellant called Lieutenant Lewis, Sergeant Wilson's supervisor and the next person in the chain of command, at his home. Lieutenant Lewis was unavailable, and Appellant left him a message. Appellant obtained a search warrant for the marijuana dealer's house. Later in the day, Appellant called Lieutenant Lewis at home again and told him about the suspected illegal drug activity at the house. Appellant reported that he had secured a search warrant and wanted to serve it that evening. Appellant did not inform Lieutenant Lewis that he had entered the house the previous day.

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2.15 Lieutenant Lewis denied Appellant's request to serve the search warrant that evening due to a shortage of on-duty staff. In addition, since the house was off campus and therefore extrajurisdictional, Lieutenant Lewis wanted adequate time to "run it up the chain of command" and then prepare a safety plan to serve the search warrant. Lieutenant Lewis instructed Appellant to provide him with the warrant and affidavit for his review.

2.16 Soon after his conversation with Appellant, Lieutenant Lewis telephoned Sergeant Wilson. When Lieutenant Lewis informed Sergeant Wilson that Appellant had obtained a search warrant for the drug dealer's house, Sergeant Wilson stated that he had told Appellant to get approval from "up the chain of command" <u>prior</u> to requesting the search warrant. However, Appellant had already obtained the search warrant before he spoke to Lieutenant Lewis and therefore disregarded Sergeant Wilson's instructions.

2.17 On March 25, 2002, Lieutenant Lewis reported to work. Appellant had provided him with the search warrant, but not a copy of the affidavit. Since Lieutenant Lewis did not have complete information without the affidavit, he called Appellant at home to get additional information and Appellant informed him that he had entered the marijuana dealer's house as a potential renter.

2.18 On March 26, 2002, Lieutenant Lewis and Sergeant Wilson discussed Appellant's search warrant process again. Lieutenant Lewis informed Sergeant Wilson that Appellant had visited the drug dealer's house in plain clothes while off duty pretending to be a potential renter. Lieutenant Lewis and Sergeant Wilson were concerned that Appellant had not notified Sergeant Wilson that he was entering the house and therefore acted in an unsafe manner. Further, they were concerned that the drug dealer had no apparent connection to the campus and Appellant had not obtained approval from Lieutenant Lewis as instructed by Sergeant Wilson before securing the search warrant.

1	2.19 On July 11, 2002, the UWPD initiated an internal investigation based on their concerns				
2	regarding Appellant's actions on March 21, 22, and 23, 2002.				
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4	2.20 On August 18, 2002, Sergeant Wilson met with Appellant and his union representative.				
5	During the meeting, Appellant stated that he could not remember whether he spoke to Lieutenant				
6	Lewis before or after he had obtained the search warrant, or whether he had called Lieutenant Lewis				
7	on March 22 or 23, 2002. Appellant also stated that he did not inform anyone prior to entering the				
8	drug dealer's house, and that he did not consider entering the house to be an extra jurisdictional				
9	police action.				
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11	2.21 By memo dated August 23, 2002, Sergeant Wilson informed Assistant Chief Annette				
12	Spicuzza of his internal investigation findings. Assistant Chief Spicuzza reviewed Sergeant				
13	Wilson's memo, Appellant's personnel file, performance evaluations, written reprimands, UWPD				
14	Extra Jurisdictional Off Duty Action Policy, UWPD Prompt Response to Orders Policy, and the				
15	search warrant and affidavit for the marijuana dealer's house.				
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17	2.22 Assistant Chief Spicuzza determined that there was no connection between the marijuana				
18	dealer and the University of Washington campus and that Appellant had been given clear				
19	instructions by Sergeant Wilson to "take it up the chain of command" prior to obtaining a search				
20	warrant. Assistant Chief Spicuzza also determined that Appellant had inappropriately engaged in				
21	police action by entering the drug dealer's house.				
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23	2.23 Assistant Chief Spicuzza determined that Appellant failed to provide any mitigating				
24	circumstances for his actions. Assistant Chief Spicuzza concluded that Appellant did not comply				
25	with directions from his supervisor, did not follow departmental policies regarding extra				
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jurisdictional off duty action and prompt response to orders, and placed himself in a potentially dangerous situation.

2.24 By memo dated October 10, 2002, Assistant Chief Annette Spicuzza recommended to Chief of Police Vicky Peltzer that Appellant receive a one-day (ten hour) suspension for his extra jurisdictional activity on March 21, 22, and 23, 2002.

2.25 By letter dated October 30, 2002, Sandra Lier, Associate Vice President, informed Appellant of his one-day (ten hour) suspension effective November 5, 2002. Ms. Lier charged Appellant with insubordination and failure to follow departmental policy. Respondent alleged that Appellant did not comply with directions from his supervisor, and did not follow departmental policy regarding extra jurisdictional off duty action and prompt response to orders in an incident that occurred on March 21, 22, and 23, 2002.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argued that Appellant clearly failed to comply with directions from his supervisor to get permission from "up the chain of command" prior to obtaining a search warrant, thereby engaging in insubordination and violating the UWPD Prompt Response to Orders Policy. Respondent asserted that Appellant also clearly failed to follow departmental policy regarding extra jurisdictional off duty action by not informing his supervisor of his police action when he entered the house. Respondent contended that Appellant entered the house without permission and placed himself in a position of danger by failing to notify the UWPD to arrange for backup assistance. Respondent asserted that no connection was ever established between the drug dealer and the University of Washington campus. Respondent contended that a one-day suspension was a modest sanction in light of Appellant's history of prior reprimands for not following the Extra Jurisdictional Policy.

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3.2 Appellant argued that entering the drug dealer's house was not a police action because he was only gathering information rather than performing surveillance or taking enforcement action. Appellant asserted that he assessed the situation carefully before entering the house and did not place himself in a dangerous situation. Appellant contended that he informed Sergeant Wilson the evening of March 22, 2002 that he had entered the house before reporting to work that day. Appellant argued that he notified Sergeant Wilson and Lieutenant Lewis about his actions as soon as circumstances allowed; therefore, he followed the Extra Jurisdictional Policy. Appellant asserted that he had more experience than Sergeant Wilson in obtaining search warrants and working undercover. Appellant argued that Sergeant Wilson did not give him a specific direct order, so there is no basis for an allegation of insubordination. Appellant contended that the manner in which he obtained the search warrant was appropriate based on UWPD past practices.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995).

4.4 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.5 Respondent has met its burden of proving that Appellant engaged in insubordination and willfully violated the University of Washington Police Department's Policy 7.07.02, Prompt Response To Orders Policy, when he disregarded his supervisor's instructions to obtain authorization from a higher-level supervisor in the chain of command prior to obtaining a search warrant. It is clear that Appellant understood Sergeant Wilson's instructions to get approval from "up the chain" because he called Lieutenant Lewis; however, he called Lieutenant Lewis after he had already obtained the search warrant.

- 4.6 Respondent has met its burden that Appellant willfully violated the University of Washington Police Department's Policy 3.02.01(2)(3), Extra Jurisdictional Off Duty Action Policy, by not informing his supervisor of his police action when he entered the drug dealer's house. We consider Appellant's actions to be "police action" and no connection was established between the drug dealer and the University of Washington campus.
- 4.7 Although it is not appropriate to initiate discipline based on prior formal and informal disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No. D93-163 (1995).

1	4.8 In determining wh	nether a sanction imposed is a	appropriate, consideration must be given to			
2	the facts and circumstant	ces, including the seriousness	s and circumstances of the offenses. The			
3	penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to					
4	prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the					
5	program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).					
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7	4.9 Based on Appellant's actions and his past work history, Respondent has established that the					
8	disciplinary action of a one-day (ten hour) suspension was not too severe and was appropriate under					
9	the circumstances presented here. In light of Appellant's behavior, we consider the one-day (ter					
10	hour) suspension to be quite lenient. The appeal should be denied.					
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12	V. ORDER					
13	NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michael Javorsky is denied.					
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15	DATED this	day of	, 2003.			
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17		WASHINGTON STATE	PERSONNEL APPEALS BOARD			
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19		Walter T. Hubbard, Chair				
20		wanei 1. Hubbaru, Chan				
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22		Gerald L. Morgen, Vice C	hair			
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